Supreme Court, U. S.
FILED
JAN 16 1979
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-957

BACHE HALSEY STUART INCORPORATED
AND IRVING J. LOUIS, JR.,

Petitioners,

v.

COMMERCIAL IRON & METAL CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

David G. Palmer
John H. Land
2900 Anaconda Tower
P. O. Box 8749
Denver, Colorado 80201
(303) 575-8000
Attorneys for Respondent

Of Counsel:
Holland & Hart
Quiat, Bucholtz, Bull & Laff

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes, and Rules Involved	3
Additional Statement of the Case	3
Reasons Why the Writ Should Be Denied	5
1. The decision below does not conflict with decisions of this Court or any court of appeal	5
2. The decision below properly applied the law of both Colorado and New York	7
Conclusion	9
Appendix	A-1

Cases:

Bassford v. Cook, 152 Colo. 136, 380 P.2d 907, 910 (1963)	7
Burgundy Basin Inn, Ltd. v. Watkins Glen Grand Prix Corp., 51 A.D.2d 140, 379 N.Y.S.2d 873 (4th Dept. 1976)	8
Commercial Iron & Metal Co. v. Bache Halsey Stuart, Inc., 581 F.2d 246 (10th Cir. 1978)	1
Commercial Iron & Metal Co. v. Bache & Co., Inc., 478 F.2d 39 (10th Cir. 1973)	1
Coral Gables, Inc. v. Mayer, 241 A.D. 340, 271 N.Y.S. 662 (1st Dept. 1934)	8
Cornell & Co. v. Barber & Ross Co., 360 F.2d 512, 513 (D.C. Cir. 1966)	6
Demsey & Associates v. S. S. Sea Star, 461 F.2d 1009, 1018 (2d Cir. 1972)	7

	Page
Gutor International AG v. Raymond Packer Co., Inc., 493 F.2d 938, 945-46 (1st Cir. 1974)	6, 7
Hadcock v. Osmer, 153 N.Y. 604, 47 N.E. 923 (1897)	8
Noved Realty Corp. v. A.A.P. Co., Inc., 250 A.D. 1, 293 N.Y.S. 336 (1st Dept. 1937)	8
Otis & Co. v. Grimes, 97 Colo. 219, 48 P.2d 788 (1935)	8
Ritzwoller v. Lurie, 225 N.Y. 464, 122 N.E. 634 (1919)	8
Sabo v. Delman, 3 N.Y.2d 155, 122 N.E.2d 906, 164 N.Y.S.2d 714 (1957)	8
Seneca Wire & Mfg. Co. v. A.B. Leach & Co., 247 N.Y. 1, 159 N.E. 700 (1928)	7
Skrine v. Staiman, 30 A.D.2d 707, 292 N.Y.S.2d 275 (2d Dept. 1968)	8
Stern v. Satra Corp., 539 F.2d 1305 (2d Cir. 1976)	8
Ultamares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441, 447 (1931)	8

Other Authorities:

15 U.S.C. § 78j (Securities Exchange Act of 1934, § 10(b))	3
28 U.S.C. § 1254(1)	2
Federal Rules of Civil Procedure, Rule 56	5
1973 C.R.S. §§11-51-101 *et seq* (Colorado Securities Act)	3
1973 C.R.S. § 4-2-721	3, 9
New York Business Law § 352-C	3
N.Y.U.C.C. § 2-721	3, 9

In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-957

BACHE HALSEY STUART INCORPORATED AND IRVING J. LOUIS, JR.,

Petitioners,

v.

COMMERCIAL IRON & METAL CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Petition, Appendix A-18) is reported at 581 F.2d 246. The jury verdict in favor of respondent (plaintiff) upheld below, and the denial by the United States District Court for the District of Colorado of petitioners' motion for judgment notwithstanding the jury's verdict, are not officially reported, but appear at pages 734-36 and 737, respectively, of the Joint Appendix filed by petitioners herein.

An earlier opinion of the United States Court of Appeals for the Tenth Circuit (Petition, Appendix A-1), also the subject of the petition, is reported at 478 F.2d 39.

JURISDICTION

The most recent opinion of the Court of Appeals, unanimously affirming the jury verdict, was entered on August 7, 1978 and the petition for rehearing was denied on September 18, 1978. The earlier, again unanimous, opinion of the Court of Appeals was entered on April 26, 1978. The order denying rehearing in that appeal was entered on May 22, 1978. Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Where the respondent (plaintiff below) was induced by false representations of petitioners to close a commodity futures investment account with respondent's former broker and to open a similar account with petitioners, and thereafter was induced by other false representations to enter into a series of agreements to purchase copper directly from petitioners, while still believing and being told that petitioners were continuing to act as respondent's broker rather than as principals in such transactions, was the unanimous decision of the Court below correct:

1. When it affirmed, under these facts, the jury's verdict upholding respondent's rescission of the subject copper purchase agreements;

2. When it held that the jury was properly instructed that if fraudulent misrepresentations and omissions were made in inducing respondent to enter into such purchase agreements, and relied upon by respondent, then respondent's rescission of the agreements was justified;

3. When it found that petitioners' claimed right to arbitrate this dispute was waived since petitioners "at no time during the entire trial raised this issue." (Petition, Appendix A-24).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

In addition to the statutes and rules cited in the petition, also applicable herein are 1973 C.R.S. § 4-2-721 and N.Y.U.C.C. § 2-721. The text of this section of the Uniform Commercial Code is set forth in the Appendix hereto, at page A-1.

ADDITIONAL STATEMENT OF THE CASE

Respondent believes that the operative facts are fairly summarized by the opinion of the Court of Appeals. (Petition, Appendix A-18 through A-30).

Petitioners' statement of the case is selective and argumentative. In certain fundamental respects, petitioners ignore or mischaracterize the evidence presented to the jury and reviewed by the Court of Appeals. Of particular importance to whether this Court should grant the writ sought, however, is the fact that this case involves a jury verdict rendered upon the basis of disputed facts and particularized misrepresentations and dealings involving solely these parties.

This action was brought by respondent Commercial Iron & Metal Co. against petitioners, seeking money damages or rescission based upon Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, New York General Business Law §352-C, the Colorado Securities Act, 1973 C.R.S. §§ 11-51-101 *et seq.* and general principles of common law fraud, negligence, and fiduciary duty.

Respondent alleged that these statutory and common law violations occurred in connection with the inducement and execution of certain transactions between respondent and petitioners involving the sale and purchase of substantial quantities of "physical" or "wire bar" copper to be delivered at future dates. The case was tried to a jury be-

fore the United States District Court for the District of Colorado in September of 1976.

At trial, exhaustive briefs and proposed instructions were submitted by both parties. The evidence was detailed and complex; it was frequently in conflict and often susceptible to differing inferences. In particular, respondent and petitioners submitted directly conflicting evidence concerning the relationship between the parties, numerous misrepresentations and omissions of petitioners, and the parties' respective understanding or misunderstanding with respect to the nature of respondent's investments in physical copper and the role of petitioners in these transactions.

At the conclusion of this evidence, the Court dismissed respondent's claims under federal and state securities laws, and its claims of negligence and breach of fiduciary duty. Thus, the case was submitted to the jury only with respect to respondent's claim of common law fraud in the inducement of the disputed purchase agreements, and petitioners' counterclaim for damages based on the same transactions. The jury was instructed to determine whether, under the strict Colorado standard of "clear and convincing evidence," respondent had proved its claims of fraudulent misrepresentations and omissions by the presentation of "evidence which is unmistakable and free from serious or substantial doubt." (Joint Appendix, 721a).

After hearing all of the evidence and observing the demeanor of the witnesses, the jury returned its verdict in favor of respondent; the trial court entered judgment in accordance with the jury verdict; and the appeal to the Tenth Circuit followed. On appeal, petitioners raised numerous alleged improprieties with respect to the trial proceedings. Petitioners argued (despite their own failure to raise this point at any time during the entire trial) that the trial court should have remanded the case to arbitration upon its dismissal of respondent's securities claims. Secondly, after having first stated at the trial that "plaintiff's [respondent's] claims do not entitle them necessarily to rescission but to damages" (Joint Appendix, 714a), petitioners argued that respondent had no right to a jury trial since its complaint asserted no claim at law. Finally, petitioners raised a number of peripheral arguments with respect to alignment of the parties and alleged errors in the trial court's instructions to the jury. Without exception, these arguments were rejected by the Court of Appeals and the verdict of the jury was unanimously affirmed.

REASONS WHY THE WRIT SHOULD BE DENIED

The decision of the Court of Appeals was correct and was in accord with the decisions of this Court and the courts of appeal. It is apparent from the petition that the true basis for petitioners' claim is that under petitioners' view of these disputed facts, the jury verdict was incorrect. Such a dispute, confined so clearly to a determination of complex and contested facts, simply does not involve questions worthy of review by the grant of certiorari.

1. *The decision below does not conflict with decisions of this Court or any court of appeal.*

Petitioners assert that the Court of Appeals' 1973 reversal of a summary judgment entered earlier in this litigation was erroneous, and in conflict with other decisions interpreting Rule 56 of the Federal Rules of Civil Procedure. Petitioners state that they were entitled to a summary judgment compelling arbitration of this matter, based on "uncontroverted proof" then before the court below. This argument is perhaps most compellingly answered by the language of the 1973 decision of the Court of Appeals:

> We do not agree with Bache's [petitioners'] position that Commercial [respondent] raised no material issues with respect to the securities laws . . .
>
> • • • •
>
> Under these conditions [facts placed in issue by the pleadings, affidavits and depositions] it is necessary for us to look outside the written documents to determine the agreement between both parties.
>
> (Petition, Appendix A-11, A-14).

The petition does not describe any manner in which either the 1973 or the 1978 decision by the Court of Appeals conflicts with any other appellate decision. The principles and policies applied by both decisions are fully in accord with the decisions of this Court and the courts of appeal.

In essence, petitioners argue that the factual disputes among these parties should have been decided by an arbitrator rather than by a federal jury, presumably because petitioners believe the outcome would have been different. But those disputes were in fact submitted to the jury without objection by petitioners at any time during trial. (Petition, Appendix A-24).

The Court of Appeals' finding that petitioners, by their conduct at trial, waived any right to arbitration they might have had, does not conflict with other appellate decisions. There is no question that the right to arbitration, like any other contract right, can be waived. *Cornell & Co. v. Barber & Ross Co.*, 360 F.2d 512, 513 (D.C. Cir. 1966) ("A party waives his right to arbitrate when he actively participates in a lawsuit or takes other action inconsistent with that right."). *See also Gutor International*

AG v. Raymond Packer Co., Inc., 493 F.2d 938, 945-46 (1st Cir. 1974); *Demsey & Associates v. S. S. Sea Star*, 461 F.2d 1009, 1018 (2d Cir. 1972). In *Gutor International, supra*, the First Circuit held that the submission of part of an arbitrable matter for court resolution waived the submitter's right to insist upon arbitration of the remainder. 493 F.2d at 945. Similarly, petitioners, by remaining silent throughout the trial and by voluntarily allowing this controversy to be determined by the jury, lost any claim they might have had to insist upon arbitration.

2. *The decision below properly applied the law of both Colorado and New York.*

Petitioners assert that the Court of Appeals erred in approving the instructions given to the jury regarding Colorado law on the issue of fraud. They claim that New York law should have controlled on this issue because of a provision contained in the written confirmation forms (which were exchanged after the parties had reached verbal agreements over the telephone); they also argue that the Uniform Commercial Code should be interpreted to preclude the admission of evidence establishing that a contractual agreement was induced by fraudulent misrepresentations and omissions.

In essence, petitioners assert that under New York law, certain of petitioners' misrepresentations and omissions would not be deemed fraudulent. Although it is clear that New York law is inapplicable to this dispute, it is also clear that there are no material distinctions between New York and Colorado law, insofar as the issues raised in this case are concerned.

Under both Colorado and New York law, innocent misrepresentation is sufficient to justify rescission of a contractual agreement. *See Bassford v. Cook*, 152 Colo. 136, 380 P.2d 907, 910 (1963); *Seneca Wire & Mfg. Co. v. A. B.*

Leach & Co., 247 N.Y. 1, 159 N.E. 700 (1928); *Ultarmares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441, 447 (1931); *Stern v. Satra Corp.*, 539 F.2d 1305 (2d Cir. 1976).

The courts of both Colorado and New York hold that fraud includes the "pretense of exact knowledge" where none exists. *See Ultramares Corp. v. Touche, supra; Burgundy Basin Inn, Ltd. v. Watkins Glen Grand Prix Corp.*, 51 A.D.2d 140, 379 N.Y.S.2d 873 (4th Dept. 1976); *Skrine v. Staiman*, 30 A.D.2d 707, 292 N.Y.S.2d 275 (2d Dept. 1968); *Hadcock v. Osmer*, 153 N.Y. 604, 47 N.E. 923 (1897); *Otis & Co. v. Grimes*, 97 Colo. 219, 48 P.2d 788 (1935).

Under New York law, a false promise relating to future actions or arrangements may constitute a material misrepresentation justifying rescission. *Sabo v. Delman*, 3 N.Y.2d 155, 122 N.E. 2d 906, 164 N.Y.S.2d 714 (1957); *Ritzwoller v. Lurie*, 225 N.Y. 464, 122 N.E. 634 (1919). Omission of a material fact in a contract or sale is the equivalent of false representation. *Noved Realty Corp. v. A.A.P. Co., Inc.*, 250 A.D. 1, 293 N.Y.S. 336 (1st Dept. 1937); *Coral Gables, Inc. v. Mayer*, 241 A.D. 340, 271 N.Y.S. 662 (1st Dept. 1934).

In sum, the law with respect to fraud in the inducement of a contractual agreement is not peculiar to Colorado or New York. Both states apply commonly understood and long-established principles; these principles were briefed at length by both parties in the proceedings below and were accurately reflected in exhaustive jury instructions given by the trial court.

Petitioners also argue that various provisions of the Uniform Commercial Code should have been applied in this case, and that these provisions would give effect to certain terms contained in the written confirmations. The 1973 opinion of the Court of Appeals, as well as the evidence adduced at trial, established that the contractual agreements

at issue were made orally, during the course of numerous telephone conversations between the parties; thus the terms of the parties' agreements were not contained in the confirmation slips upon which petitioners rely. Further, the Uniform Commercial Code does not in any respect preclude evidence of fraudulent misrepresentations and omissions where a party seeks rescission of an agreement induced by such means. 1973 C.R.S. § 4-2-71; N.Y.U.C.C. § 2-721.

Finally, petitioners argue that the jury was confused by the evidence introduced by both parties, or by the trial court's instructions, concerning the relationship between the parties. As was discussed in detail in respondent's brief to the Court of Appeals, and in the Court's opinion (Petition, Appendix, A-27--A-28), such evidence was directly relevant to proof of certain misrepresentations and omissions of petitioners. The instructions correctly permitted the jury to determine whether a confidential relationship had been established between the parties, and the jury was not instructed that a fiduciary relationship existed between the parties. Again, the jury was fully and correctly instructed with respect to each of these issues.

CONCLUSION

Respondent respectfully submits that the petition for a writ of certiorari should be denied.

David G. Palmer
John H. Land
2900 Anaconda Tower
P. O. Box 8749
Denver, Colorado 80201
(303) 575-8000
Attorneys for Respondent

Of Counsel:
Holland & Hart
Quiat, Bucholtz, Bull & Laff

APPENDIX

COLORADO REVISED STATUTES UNIFORM COMMERCIAL CODE

§4-2-721. Remedies for fraud. Remedies for material misrepresentation or fraud include all remedies available under this article for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

NEW YORK UNIFORM COMMERCIAL CODE

§ *2-721. Remedies for Fraud*

Remedies for material misrepresentation or fraud include all remedies available under this Article for non-fraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.